No. 7890

In the United States Circuit Court of Appeals

For the Ninth Circuit

WALTER BAER,

Appellant,

vs.

ROY J. NORENE, Divisional Director of Immigration, for the District of Oregon,

Appellee.

Brief for Appellant

Upon Appeal from the United States District Court for the District of Oregon.

IRVIN GOODMAN,
Yeon Building, Portland, Oregon, for Appellant.

CARL C. DONAUGH,
United States Attorney for the District of Oregon, and

HUGH L. BIGGS,
Assistant United States Attorney for the District of Oregon,
506 United States Court House, Portland, Oregon, for Appellee.

DEMPSEY, KIMSEY & DOWNS, PRINTERS

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Upon Appeal from the United States District Court for the District of Oregon.

This appeal is taken from the order of the United States District Court for the District of Oregon dismissing appellant's petition for writ of habeas corpus.

STATEMENT OF CASE

Appellant, thirty-seven-year-old civil engineer, was arrested April 9, 1934, by Appellee, Divisional Director of Immigration for the District of Oregon, upon a warrant received from the Department of

Labor alleging that Appellant was a citizen of Germany, entered the United States July 6, 1907, remained continuously thereafter and, subsequent to May 1, 1917, had been imprisoned more than once for a term of one year or more for the commission of crimes involving moral turpitude, to-wit: burglary in the second degree in Idaho in 1917, and sentenced to more than one year; knowingly uttering a forged bank check in Oregon in 1919, and sentenced to more than one year; forgery of endorsement in the State of Oregon in 1921 and sentenced to more than one year. (Tr., pp. 33-4-5.)

Appellant, since his final release from prison in 1924, married and is the sole support of his young wife, born near Portland, of three little children, all born in Portland, whose ages are eight, five and three, and the partial support of his aged and crippled father of over seventy years. (Tr., p. 7.)

Appellant committed no crime since 1921 and the three crimes herein mentioned followed his extensive services as a youth in the Oregon National Guard and Third Oregon Regiment as follows:

1. In Company B, Oregon National Guard and honorably discharged.

2. In Company D, Oregon National Guard and honorably discharged.

3. In Battery A, Field Artillery, Third Oregon and honorably discharged.

4. In Company D, Third Oregon and honorably discharged from service on Mexican border and final discharge reads "discharged account imprisonment by civil authority." (Tr., pp. 8-9.)

The issue presented upon this appeal is whether or not the District Court erred in holding the three crimes herein mentioned involve moral turpitude within the meaning of the Immigration Law. (Tr., p. 35.)

SPECIFICATION OF ERRORS

Appellant contends the District Court erred in not granting the writ of habeas corpus and discharging Appellant from custody of Appellee by holding the three crimes herein mentioned involve moral turpitude within the meaning of the Immigration Law. (Tr., p. 30.)

BRIEF OF ARGUMENT

Appellant shall endeavor to present this Brief of Argument in an organized manner, considering the points and law relied upon in a chronological order:

POINT I.

THIS PROCEEDING IS BROUGHT UNDER UNITED STATES STATUTES AT LARGE (64th Congress), 1915-17, Vol. 39, Sec. 19, p. 889, which reads:

"except as hereinafter provided, any alien . . . who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . ."

POINT II.

THE COURTS IN DETERMINING WHETHER OR NOT A CRIME INVOLVES MORAL TURPITUDE MUST LOOK ONLY TO THE INHERENT NATURE OF THE CRIME OR TO THE FACTS CHARGED IN THE INDICTMENT AND THE GRAVITY OF PUNISHMENT IS NOT CONTROLLING.

In United States ex rel Zaffarano vs. Corsi, Commissioner of Immigration (C.C.A.) (63 Fed. (2nd) 757), Judges L. Hand, Swan and Augustus N. Hand, held: "We have heretofore held that, in determining whether the crime of which an alien stands convicted is one "involving moral turpitude," **neither the immigration officials nor the courts sitting in review of their action may go beyond the record of conviction. They must look only to the inherent nature of the crime or to the facts charged in the indictment upon which the alien was convicted, to find the moral turpitude requisite for deportation for this cause.** Since the indictment was not before the immigration officials they knew nothing as to the specific charge upon which the relator was convicted. It may have involved moral turpitude, or it may not. **The gravity of the punishment is not**

controlling . . . the crime committed must itself involve moral turpitude. Hence we think the record is insufficient to support the action of the immigration officials in ordering deportation. **This language means that neither the immigration officials nor the court reviewing their decision may go outside the record of conviction to determine whether in the particular instance the alien's conduct was immoral.** And by the record of conviction we mean the charge (indictment), plea, verdict and sentence. The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted. . . ."

POINT III.

THE INHERENT NATURE OF THE CRIMES OF (1) BURGLARY IN THE SECOND DEGREE IN IDAHO IN 1917; (2) KNOWINGLY UTTERING A FORGED BANK CHECK IN OREGON IN 1919; (3) FORGERY OF ENDORSEMENT IN OREGON IN 1919 MUST BE THE DETERMINING FACTOR IN THIS CASE SINCE APPELLEE DID NOT PRODUCE THE INDICTMENTS AND THEY ARE NO PART OF THE RECORD HEREIN.

(See authority under Point II.)

POINT IV.

WHAT ARE THE AFORESAID CRIMES, SO THAT THEIR INHERENT NATURE MAY BE DETERMINED? (Appellant shall omit from consideration the crime of Burglary in the Second Degree

in Idaho in 1917 because, Appellant contends, as alleged in Amended Petition for Writ of Habeas Corpus (Tr., p. 6), but not admitted by Appellee, that Appellant was pardoned for said crime, thus removing same from the Immgiration Law.)

> Oregon Code, 1930, Vol. 1, Sec. 14-379, Forgery or altering record, etc.: "If any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit any public record whatever, or any certificate, return, or attestation of any clerk, notary public, or other public officer, in relation to any matter wherein such certificate, return, or attestation may be received as legal evidence, or any note, certificate or other evidence of debt issued by any officer of this state, or any county, town, or other municipal or public corporation therein, authorized to issue the same, or any application to purchase state lands or assignment thereof, contract, charter, letters, patent, deed, lease, bill of sale, will, testament, bond, writing obligatory, undertaking, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, evidence of debt, or any acceptance of a bill of exchange, indorsement, or assignment of a promissory note, or any warrant, order, or check, or money, or other property, or any receipt for money or other property, or any acquittance or discharge for money or other property, or any plat, draft, or survey of land; or shall, with such intent, knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited record, writing, instrument, or matter

whatever, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two nor more than twenty years."

POINT V.

BUT IN DETERMINING THE INHERENT NATURE OF THE CRIMES OF KNOWINGLY UTTERING A FORGED BANK CHECK AND FORGERY OF ENDORSEMENT IS THE CRITERION OF JUDGMENT TO BE SOCIETY'S VIEWPOINT TOWARDS THOSE CRIMES IN THE YEARS 1919 AND 1921, WHEN COMMITTED, OR THE VIEWPOINT OF 1935, THE IMMIGRATION DEPARTMENT NOT HAVING INSTITUTED THE WITHIN DEPORTATION PROCEEDINGS UNTIL FOURTEEN YEARS AFTER COMMISSION OF THE LAST CRIME?

"Moral turpitude is a term which conforms to and is consonant with the state of the public morals; hence, it can never remain stationary."
North Dakota vs. Joe Malusky, Appt. (1930), 71 A. L. R., p. 190.

"What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases where no

other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted. But at the present day either stocks or whipping might be thought an infamous punishment." Justice Gray in Ex parte Wilson, 114 U. S., p. 417.

POINT VI.

APPELLANT CONTENDS THAT IF THE CRITERION OF JUDGMENT IS SOCIETY'S VIEWPOINT IN 1935 THEN, IN ANY EVENT, THE CRIMES OF KNOWINGLY UTTERING A FORGED BANK CHECK AND FORGERY OF ENDORSEMENT ARE OBVIOUSLY NOT CRIMES INVOLVING MORAL TURPITUDE BECAUSE SUCH CRIMES ARE ALMOST DAILY DISPOSED OF BY MUNICIPAL JUDGES AS CHECK VAGRANCY CHARGES AND THE CIRCUIT COURT OF APPEALS SHOULD TAKE JUDICIAL NOTICE OF THAT FACT.

POINT VII.

INDEED THE TERM MORAL TURPITUDE AS APPLIED TO THE IMMIGRATION ACT IS VAGUE, INDEFINITE, NOT SUSCEPTIBLE OF EXACT DEFINITION AND, IN 1926, CONGRESS EVEN DETERMINED TO DELETE THE PHRASE FROM THE IMMIGRATION ACT.

The Harvard Law Review, Vol. 43, (1929-30),

beginning on p. 117, states: "Violation of the Volstead Act and petit larceny have recently been held to involve moral turpitude; manslaughter, violation of a state liquor law, and fornication were held not to. Such a patchwork of decisions brings again to the fore the meaning of the phrase, "Crimes involving moral turpitude," and invites examination of its content. . . . **"But it is in the Immigration Act that the phraseology seems most unfortunate.** Though proceedings under the act are not criminal, they are sufficiently severe in the application to be in their nature penal. **Men who are menaced with the loss of civil rights should know with certainty the possible grounds of forfeiture. And the loose terminology of moral turpitude hampers uniformity; it is anomalous that for the same offense a person should be deported or excluded in one circuit and not in another. But the weightiest objcetion is that the statute operates upon thousands to whom judicial review is denied by economic barriers. For them the final decision is to be made by lay administrators. It is hardly to be expected that words which baffle judges will be more easily interpreted by laymen; if power must be delegated, it should be clearly circumscribed."** . . . "The conclusion seems inevitable that in the classification of crimes it is perilous and idle to expect an indefinite statutory term to acquire precision by the judicial process of exclusion and inclusion. The legislature can ordinarily better accomplish its purpose by enumerating the proscribed offenses, or by dividing them on the basis of penalty imposed. Either

method would replace with a uniform standard the apocalyptic criteria of individual judges." . . . In footnotes, on p. 121, we find: "In 1926 the House Committee on Immigration and Naturalization determined to delete the phrase from the act. H. R. Rep. No. 69, 1, 3, 69th Congress, 1st Sess. at 3. But to date Congress has been unable to agree on changes in the wording." 70 Cong., Rec. 3533, 3547, 4951 (1929)."

POINT VIII.

SINCE EVEN MANSLAUGHTER HAS BEEN HELD BY THE FEDERAL COURT NOT TO BE A CRIME INVOLVING MORAL TURPITUDE, HOW CAN THIS COURT DETERMINE THAT CRIMES OF KNOWINGLY UTTERING A FORGED BANK CHECK AND FORGERY OF ENDORSEMENT COMMITTED BY A MERE YOUTH FOURTEEN AND MORE YEARS AGO INVOLVE MORAL TURPITUDE?

In the case of United States ex rel Mongievi vs. Karnuth, Dist. Dir. of Immi., 30 Fed. (2d) 825, the relator, who was discharged, entered the United States in 1913, and subsequently pleaded guilty to an indictment for manslaughter and sentenced to not less than six and one-half years and not more than fifteen years. The Court stated:

"It is now contended in his behalf that manslaughter in the second degree is not a crime involving moral turpitude, and therefore his deportation is illegal. Moral turpitude is defined as

"an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society." The intentional slaying of a human being, even though committed without malice, and manslaughter in the first degree, which apparently includes intent and willfulness, would therefore be offenses involving moral turpitude."

"This court is without power to examine into the evidence upon which the conviction or the relator's plea of guilty of manslaughter in the second degree was based (U. S., etc., vs. Uhl (D. C.), 203 F. 152) and accordingly resort must be had to the statutes of the state of New York to define the particular character of the crime. . . ."

"The Solicitor of the Department of Justice, not long since, in a definition of crimes involving moral turpitude for the information of immigration officers, specified a number of offenses which, in his judgment, involved moral turpitude, and excepted offenses which were "the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, or of mistaken principles, unaccompanied by a vicious motive or corrupt mind." **Although this general summary is vague and indefinite, yet I think that the commission of manslaughter in the second degree is "unaccompanied by a vicious motive or corrupt mind."**

"The instant case is quite different from Weedings Yamada (C. C. A.), 4 Fed. (2d) 455, and U. S. ex rel Norlacci vs. Smith, etc., 8 Fed (2d) 663, decided by this court, wherein it was ruled that, as the crime of assault with a deadly

weapon, as defined in the respective state statutes, was committed with an intent to do bodily harm, the offense involved moral turpitude. **The deportation of the relator would involve great hardship, inasmuch as he has lived in this country for the past ten years, and has dependent upon him, especially since his parole, his wife and two children born in Italy. If his testimony before the inspector is reliable, he has never been arrested or convicted of a crime, committed either in Italy or in this country, except the crime for which he was sentenced as herein stated. In an affidavit filed in this proceeding, he deposed that it was his daughter who accidentally suffered death at his hands in the course of a quarrel between him and his wife, wherein there was a struggle for possession of a pistol, which, during the struggle, was accidentally discharged. However, as heretofore pointed out, going beyond the record of conviction to ascertain the facts is not required, since the question of moral turpitude must be determined, as Judge Noyes said, in U. S., etc., vs. Uhl, supra, "According to the nature and not according to the facts and particular circumstances accompanying the commission of it."**

"So considered, the writ of habeas corpus, in my opinion, must be sustained, and the relator discharged from custody. So ordered."

POINT IX.

FINALLY APPELLANT SUBMITS THE FOLLOWING TWO CASES TO THE CIRCUIT COURT OF APPEALS FOR SERIOUS CONSIDERATION:

I.

In the case of Ex parte Saraceno (Circuit Court, S. D., New York (1910), 182 Fed. p. 955, one Pasquale Saraceno applied for a writ of habeas corpus to obtain discharge from custody under the deportation law. The Court, granting the writ, stated:

> "Pasquale Saraceno came to this country in the year 1899 from the town of Reggie in Calabria, Italy, right opposite Messina. He remained here until January, 1909, when he returned to Italy on account of the earthquake, which occurred at Messina, to look up his relatives. His wife and three children followed him in about four months. September 27, 1910, he returned to this country alone and was detained for examination.... It also appears that he had been twice arrested, as he says on suspicion, being convicted on the second of these occasions October 23, 1907, of carrying a concealed weapon, viz., a revolver, and sentenced to imprisonment for 15 days."
>
> "This alien is ordered to be deported because he falls within the class of 'persons likely to become a public charge' and 'of persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude."

"If there was any evidence competent or otherwise to sustain this finding, the court, though of a different opinion, should not disturb it. **But it is impossible to avoid the conclusion that the real ground for the order is that the immigration authorities think the alien an undesirable citizen, which is a class not excluded by the immigration law. The proof, as we have seen, is that the alien is not without funds, is young, healthy, following the trade by which he has supported himself and his family for years in this country, and is going to his brother, who has lived here for years following the trade of tailor.**"

"The fact that he was arrested four years ago for **carrying a concealed weapon** is no evidence whatever that he is likely to become a public charge. **Nor does that offense involve moral turpitude.**"

"While the powers intrusted to the immigration authorities are very great and important and should not be restricted by the courts it is easy to see that upon the reasoning of the board in this case almost any immigrant might be deported. **The alien is discharged. . . .**"

II.

In the case of Ex parte Edmead (District Court, Dist. Mass. (1928), 27 Fed. (2nd) p. 438), the facts are that Edmead is a young colored woman, worked as domestic, convicted of petty larceny, sentenced to three months in the House of Correction. Later she gaves birth to an illegitimate child, was again ar-

rested for larceny, sentenced to one year in jail. In considering a petition for writ of habeas corpus the Court stated:

> "The only ground of deportation now relied on is that Edmead has been convicted of a "crime involving moral turpitude.' That the expression connotes something more than 'illegal' or 'criminal' is clear—law and morality are by no means identical. The best definition which I have found is Judge Walker's in Coykendall vs. Skrmetta (C. C. A.) 22 Fed (2nd) 120: 'The words 'involving moral turpitude' as long used in the law with reference to crimes, refer to conduct which is inherently base, vile, or depraved, contrary to accepted rules of morality whether it is or is not punishable as a crime. They do not refer to conduct which, before it was made punishable as a crime, was not generally regarded as morally wrong or corrupt, as offensive to the moral sense as ordinarily developed." 22 Fed. (2nd) 120, 121.
>
> "Whether any particular conviction involves moral turpitude under this test may be a question of fact. Some crimes are of such character as necessarily to involve this element; others of which the punishment is quite as severe do not (see Ex parte Saraceno (C. C.), 182 Fed. 955); and still others might involve it or might not. As to this last class, the circumstances must be regarded to determine whether moral turpitude was shown. While there is authority that all larceny involves moral turpitude (see Re A. M. Henry, 15 Idaho 755, 99 Pac. 1054) **I am not prepared to agree that a boy who steals an apple**

from an orchard is guilty of "inherently base, vile, or depraved conduct." Where the larceny is petty I think the circumstances must be inquired into."

"The evidence as it stands about the crimes for which Edmead was convicted does not seem to me to prove moral turpitude. While she does not appear to be a very desirable citizen, she is not on that account to be denied her legal rights."

The Edmead case was appealed to the Circuit Court of Appeals for the First Circuit (1929) (Tillinghast, Immigration Com'r, vs. Edmead, 31 Fed. (2d), p. 81). Although the District Court was reversed, Circuit Judge Anderson dissented. Appellant desires to quote from the dissenting opinion of Judge Anderson:

"I agree with those views. (i e., Judge Ward.) It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude. But such is the logical result of the majority opinion."

"When Blackstone wrote his treatise lauding the justice and reason of the English law, there were, as I recall it, something like 120 capital offenses in England, including larceny of property worth 5 shillings. It was one of the most brutal systems of law ever in force in any land at any time. Blackstone's assumption of personal knowledge from the 'the Great Lawgiver' as to what offenses are mala in se and can 'contract

no additional turpitude from being declared unlawful by the inferior Legislature,' I think absurd. Nothing could be more chaotic, illogical and unethical than our prevailing views and practices as to property rights. **Essentially, our legal and economic structure is predatory. We do not attempt to co-ordinate acquisition with useful productivity. Our common methods of 'big money making' always involve getting the results of other people's productive labor. On any sound and ethical theory of property rights, winnings at gambling—even stock gambling—are as unjustifiable as many kinds of takings condemned by statute as larcenies. Until our code of property rights and wrongs bears more relation to anti-social methods of acquisition, I think the moral turpitude taboo should not be extended to cover such trifling offenses as this ignorant colored girl testifies (there is no other evidence) she committed. This case is of little importance, probably not even to the Appellee; but the doctrine now enunciated may do much harm."**

IN CONCLUSION

Over fourteen and more years ago a mere youth, following extensive service in Oregon National Guards and Third Oregon Regiment, committed some crimes. While paying the penalty to society he utilized his time to become a civil engineer, receiving instructions through university extension courses, which he mastered while locked in a tiny prison cell. Upon final release over eleven years ago he fol-

lowed his profession with esteem, holding highly responsible positions, including employment for the United States Coast and Geodetic Survey, the City of Portland, the Title and Trust Company of Portland, Wallowa Law, Land and Abstract Company of Enterprise, Stevens and Koon, consulting engineers of Portland, and, further, in the year 1933 your petitioner was the originator and designer of the plans and specifications and cost estimates filed with and accepted by the City Council of the City of Portland for a six million dollar sewage disposal plant, which was subsequently voted upon at a special city election. (Tr., p. 8.) He also married a young Oregon woman and is now the sole support of his wife and their three little children, all born in Portland, whose ages are eight, five and three, and the partial support of his aged and crippled father of over seventy years. The little family lived happily together in a small home near the outskirts of Portland.

In the year 1935, over fourteen years since the last crime was committed, Appellee, for reasons firmly concealed, swoops down upon the little family, arrests the father for deportation to Germany and makes the generous offer to send the American-born wife and three little children along! To this almost unbelievable act of barbarity, to this well-nigh incredible, but nevertheless, true story. Appellee asks the Circuit Court of Appeals to become a party by lending its sanction.

"AS TO ITS CRUELTY," SAYS JUSTICE FIELD, "NOTHING CAN EXCEED A FORCIBLE DEPORTATION FROM A COUNTRY OF ONE'S RESIDENCE, AND THE BREAKING UP OF ALL THE RELATIONS OF FRIENDSHIP, FAMILY, AND BUSINESS THERE CONTRACTED. The laborer may be seized at a distance from his home, his family, and his business and taken before the judge (now the immigration inspector) for his condemnation, without permission to visit his home, see his family, or complete any unfinished business." (Fong Yue Ting vs. U. S., 149 U. S., p. 759.)

One of America's foremost legalists, Dr. Zechariah Chafee, Jr., professor of law in Harvard university, expresses the same idea in these words:

"Exclusion of a newly arrived alien by administrative fiat is not a serious hardship, for he simply returns to his old life and takes up the threads where he recently dropped them, BUT EXCLUSION AFTER LONG RESIDENCE IS ANOTHER AFFAIR." (Freedom of Speech, p. 234.)

Appellant respectfully urges that a writ of habeas corpus issue herein and that he be restored to his liberty.

Respectfully submitted,

IRVIN GOODMAN,

Attorney for Appellant.

Yeon Building, Portland, Oregon.